U.S.C. 1182(n)(1)(E)–(G)). These additional attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. If the LCA is certified by ETA, notice of the certification will be sent to the employer, either by return FAX (where the Form ETA 9035 was submitted by FAX), by hard copy (where the Form ETA 9035 was submitted by U.S. Mail), or by electronic certification (where the Form ETA 9035E was submitted electronically). The employer reaffirms its acceptance of all of the attestation obligations by submitting the LCA to the Immigration and Naturalization Service in support of the Petition for Nonimmigrant Worker, INS Form I–129, for an H–1B nonimmigrant. See INS regulation 8 CFR 214.2(h)(4)(iii)(B)(*2*), which specifies that the employer will comply with the terms of the LCA for the duration of the H–1B nonimmigrant's authorized period of stay.

(2) The employer shall maintain the original signed and certified LCA in its files, and shall make a copy of the LCA, as well as necessary supporting documentation (as identified under this subpart), available for public examination in a public access file at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the LCA is filed with ETA.

(3) The employer then may submit a copy of the certified, signed LCA to INS with a completed petition (Form I–129) requesting H–1B classification.

(4) The employer shall not allow the nonimmigrant worker to begin work until INS grants the alien authorization to work in the United States for that employer or, in the case of a nonimmigrant previously afforded H–1B status who is undertaking employment with a new H–1B employer, until the new employer files a nonfrivolous petition (Form I–129) in accordance with INS requirements.

(5) The employer shall develop sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its LCA and the accuracy of information provided, in the event that such statement or information is challenged. The employer shall also maintain such documentation at its principal place of business in the U.S. and shall make such documentation available to DOL for inspection and copying upon request.

[65 FR 80210, Dec. 20, 2000, as amended at 66 FR 63300, Dec. 5, 2001]

§ 655.710 What is the procedure for filing a complaint?

(a) Except as provided in paragraph (b) of this section, complaints concerning misrepresentation in the labor condition application or failure of the employer to meet a condition specified in the application shall be filed with the Administrator, Wage and Hour Division (Administrator), ESA, according to the procedures set forth in subpart I of this part. The Administrator shall investigate where appropriate, and after an opportunity for a hearing, assess appropriate sanctions and penalties, as described in subpart I of this part.

(b) Complaints arising under section 212(n)(1)(G)(i)(II) of the INA, 8 U.S.C. 1182(n)(1)(G)(i)(II), alleging failure of the employer to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street & Constitution Avenue, NW., Washington, DC 20530. The Department of Justice shall investigate where appropriate and shall take such further action as may be appropriate under that Department's regulations and procedures.

[65 FR 80210, Dec. 20, 2000]

§ 655.715 Definitions.

For the purposes of subparts H and I of this part:

Actual wage means the wage rate paid by the employer to all individuals with experience and qualifications similar to the H–1B nonimmigant's experience and qualifications for the specific employment in question at the place of employment. The actual wage established by the employer is *not* an average of the wage rates paid to all workers employed in the occupation.

Administrative Law Judge (ALJ) means an official appointed pursuant to 5 U.S.C. 3105.

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under subpart H or I of this part.

Aggrieved party means a person or entity whose operations or interests are adversely affected by the employer's alleged non-compliance with the labor condition application and includes, but is not limited to:

(1) A worker whose job, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;

(2) A bargaining representative for workers whose jobs, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;

(3) A competitor adversely affected by the employer's alleged non-compliance with the labor condition application; and

(4) A government agency which has a program that is impacted by the employer's alleged non-compliance with the labor condition application.

Area of intended employment means the area within normal commuting distance of the place (address) of employment where the H–1B nonimmigrant is or will be employed. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.*, normal commuting distances might be 20, 30, or 50 miles). If the place of employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of employment; however, all locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distance. The borders of MSAs and PMSAs are not controlling with regard to the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (*e.g.*, near the border of) the MSA or PMSA (or CMSA).

Attorney General means the chief official of the U.S. Department of Justice or the Attorney General's designee.

Authorized agent and *authorized representative* mean an official of the employer who has the legal authority to commit the employer to the statements in the labor condition application.

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Certify means the act of making a certification.

Certifying Officer and *Regional Certifying Officer* mean a Department of Labor official, or such official's designee, who makes determinations about whether or not to certify labor condition applications.

Chief Administrative Law Judge (Chief ALJ) means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

Department and *DOL* mean the United States Department of Labor.

Division means the Wage and Hour Division of the Employment Standards Administration, DOL.

Employed, employed by the employer, or employment relationship means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, ''no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'' *NLRB* v. *United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

Employer means a person, firm, corporation, contractor, or other association or organization in the United

States which has an employment relationship with H–1B nonimmigrants and/or U.S. worker(s). The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H–1B nonimmigrant is deemed to be the employer of that H–1B nonimmigrant.

Employment and Training Administration (ETA) means the agency within the Department which includes the Office of Workforce Security (OWS).

Employment Standards Administration (ESA) means the agency within the Department which includes the Wage and Hour Division.

Immigration and Naturalization Service (INS) means the component of the Department of Justice which makes the determination under the INA on whether to grant visa petitions of employers seeking the admission of nonimmigrants under H–1B visas for the purpose of employment.

INA means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq*.

Independent authoritative source means a professional, business, trade, educational or governmental association, organization, or other similar entity, not owned or controlled by the employer, which has recognized expertise in an occupational field.

Independent authoritative source survey means a survey of wages conducted by an independent authoritative source and published in a book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's application. Such survey shall:

(1) Reflect the average wage paid to workers similarly employed in the area of intended employment;

(2) Be based upon recently collected data—*e.g.*, within the 24-month period immediately preceding the date of publication of the survey; and

(3) Represent the latest published prevailing wage finding by the authoritative source for the occupation in the area of intended employment.

Interested party means a person or entity who or which may be affected by the actions of an H–1B employer or by the outcome of a particular investigation and includes any person, organization, or entity who or which has notified the Department of his/her/its interest or concern in the Administrator's determination.

Lockout means a labor dispute involving a work stoppage, wherein an employer withholds work from its employees in order to gain a concession from them.

Occupation means the occupational or job classification in which the H–1B nonimmigrant is to be employed.

Office of Workforce Security (OWS) means the agency of the Department which is charged with administering the national system of public employment offices.

Period of intended employment means the time period between the starting and ending dates inclusive of the H–1B nonimmigrant's intended period of employment in the occupational classification at the place of employment as set forth in the labor condition application.

Place of employment means the worksite or physical location where the work actually is performed.

(1) The term does not include any location where either of the following criteria—paragraph (1)(i) or (ii)—is satisfied:

(i) *Employee developmental activity*. An H–1B worker who is stationed and regularly works at one location may temporarily be at another location for a particular individual or employer-required developmental activity such as a management conference, a staff seminar, or a formal training course (other than ''on-the-job-training'' at a location where the employee is stationed and regularly works). For the H–1B worker participating in such activities, the location of the activity would not be considered a ''place of employment'' or ''worksite,'' and that worker's presence at such location—whether owned or controlled by the employer or by a third party—would not invoke H–1B program requirements with regard to that employee at that location. However, if the employer uses H–1B nonimmigrants as instructors or resource or support staff who continuously or regularly perform their duties at such locations, the locations would be ''places of employment'' or ''worksites'' for any such employees and,

thus, would be subject to H–1B program requirements with regard to those employees.

(ii) *Particular worker's job functions.* The nature and duration of an H–1B nonimmigrant's job functions may necessitate frequent changes of location with little time spent at any one location. For such a worker, a location would not be considered a ''place of employment'' or ''worksite'' if the following three requirements (*i.e.,* paragraphs (1)(ii)(A) through (C)) are all met—

(A) The nature and duration of the H–1B worker's job functions mandates his/her short-time presence at the location. For this purpose, either:

(*1*) The H–1B nonimmigrant's job must be peripatetic in nature, in that the normal duties of the worker's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location; or

(*2*) The H–1B worker's duties must require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations; and

(B) The H–1B worker's presence at the locations to which he/she travels from the ''home'' worksite is on a casual, short-term basis, which can be recurring but not excessive (*i.e.,* not exceeding five consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations); and

(C) The H–1B nonimmigrant is not at the location as a ''strikebreaker'' (*i.e.,* the H–1B nonimmigrant is not performing work in an occupation in which workers are on strike or lockout).

(2) Examples of ''non-worksite'' locations based on worker's job functions: A computer engineer sent out to customer locations to ''troubleshoot'' complaints regarding software malfunctions; a sales representative making calls on prospective customers or established customers within a ''home office'' sales territory; a manager monitoring the performance of out-stationed employees; an auditor providing advice or conducting reviews at customer facilities; a physical therapist providing services to patients in their homes within an area of employment; an individual making a court appearance; an individual lunching with a customer representative at a restaurant; or an individual conducting research at a library.

(3) Examples of ''worksite'' locations based on worker's job functions: A computer engineer who works on projects or accounts at different locations for weeks or months at a time; a sales representative assigned on a continuing basis in an area away from his/her ''home office;'' an auditor who works for extended periods at the customer's offices; a physical therapist who ''fills in'' for full-time employees of health care facilities for extended periods; or a physical therapist who works for a contractor whose business is to provide staffing on an ''as needed'' basis at hospitals, nursing homes, or clinics.

(4) Whenever an H–1B worker performs work at a location which is not a ''worksite'' (under the criterion in paragraph (1)(i) or (1)(ii) of this definition), that worker's ''place of employment'' or ''worksite'' for purposes of H–1B obligations is the worker's home station or regular work location. The employer's obligations regarding notice, prevailing wage and working conditions are focused on the home station ''place of employment'' rather than on the above-described location(s) which do not constitute worksite(s) for these purposes. However, whether or not a location is considered to be a ''worksite''/''place of employment'' for an H–1B nonimmigrant, the employer is required to provide reimbursement to the H–1B nonimmigrant for expenses incurred in traveling to that location on the employer's business, since such expenses are considered to be ordinary business expenses of employers (§§ 655.731(c)(7)(iii)(C); 655.731(c)(9)). In determining the worker's ''place of employment'' or ''worksite,'' the Department will look carefully at situations which appear to be contrived or abusive; the Department would seriously question any situation where the H–1B nonimmigrant's purported ''place of employment'' is a location other than where the worker spends most of his/

her work time, or where the purported ''area of employment'' does not include the location(s) where the worker spends most of his/her work time.

Required wage rate means the rate of pay which is the higher of:

(1) The actual wage for the specific employment in question; or

(2) The prevailing wage rate (determined as of the time of filing the application) for the occupation in which the H–1B nonimmigrant is to be employed in the geographic area of intended employment. The prevailing wage rate must be no less than the minimum wage required by Federal, State, or local law.

Secretary means the Secretary of Labor or the Secretary's designee.

Specialty occupation means an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the United States. The nonimmigrant in a specialty occupation shall possess the following qualifications: (1) Full state licensure to practice in the occupation, if licensure is required for the occupation; (2) completion of the required degree; or (3) experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty. 8 U.S.C. 1184(i). Determinations of specialty occupation and of nonimmigrant qualifications are made by INS.

Specific employment in question means the set of duties and responsibilities performed or to be performed by the H–1B nonimmigrant at the place of employment.

State means one of the 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

State Employment Security Agency (SESA) means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with OWS in the operation of the national system of public employment offices.

Strike means a labor dispute wherein employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operation.

United States worker (''U.S. worker'') means an employee who is either

(1) A citizen or national of the United States, or

(2) An alien who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under section 207 of the INA, is granted asylum under section 208 of the INA, or is an immigrant otherwise authorized (by the INA or by the Attorney General) to be employed in the United States.

Wage rate means the remuneration (exclusive of fringe benefits) to be paid, stated in terms of amount per hour, day, month or year (see definition of ''Required Wage Rate'').

[59 FR 65659, 65676, Dec. 20, 1994, as amended at 65 FR 80211, Dec. 20, 2000]

§ 655.720 Where are labor condition applications to be filed and processed?

(a) *Facsimile transmission (FAX).* If the employer submits the LCA (Form ETA 9035) by FAX, the transmission shall be made to 1–800–397–0478 (regardless of the intended place of employment for the H–1B nonimmigrant(s)). (Note: the employer submitting an LCA via FAX shall not use the FAX number assigned to an ETA regional office, but shall use only the 1–800–397–0478 number designated for this purpose.) The cover pages to Form ETA 9035 (i.e., Form ETA 9035CP) should not be FAXed with the Form ETA 9035.

(b) *U.S. Mail.* If the employer submits the LCA (Form ETA 9035) by U.S. Mail, the LCA shall be sent to the ETA service center at the following address: ETA Application Processing Center, P.O. Box 13640, Philadelphia PA 19101 (regardless of the intended place of employment for the H–1B nonimmigrant(s)).

(c) *Electronic submission.* If the employer submits the LCA (Form ETA 9035E) by electronic transmission, the submission shall be made on the Department of Labor WEB page at www.lca.doleta.gov (regardless of the intended place of employment for the H–1B nonimmigrant(s)). The employer shall follow the instructions in the electronic submission process, which